IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 346

SILESIAN AMERICAN CORPORATION, Debtor and SILESIAN HOLDING COMPANY,

Petitioners,

against

TOM C. CLARK, Attorney General, as successor to The Alien Property Custodian,

Respondent.

BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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The Government's Point I

Under Point I the Government argues, citing many cases, the summary nature of the Custodian's power of seizure of enemy property. Not a single one of these cases involves an attempt by the Custodian to seize property in the hands of non-enemy pledgees. Petitioner Silesian does not dispute the proposition that the Custodian had an incontestable power summarily to obtain possession of property determined to belong to an enemy.

Such power, however, does not extend to pledged property. The history of §8(a) clearly demonstrates that it was the express intention of Congress not to permit the Custodian to take into his possession by summary process enemy property in the hands of such friendly pledgees. The Circuit Court of Appeals for the Second Circuit indicated the reason for this exception (*Silesian* brief, p. 15), and Judge Hand conceded that such is the law unless the amendments to §5(b) produced a different result (R. 67). Consequently the cases cited by the Custodian which do not present a situation in which the Custodian seized or attempted to seize property held by friendly pledgees are beside the point. Moreover, the mere fact that a pledgee whose property had been actually seized by the Custodian could endeavor to obtain compensation under the Tucker Act or to recover possession of the same through a proceeding under §9(a) does not eliminate the specific exemption from seizure provided for in §8(a) nor does it take away the right to resist any attempt by the Custodian to disregard the provisions of §8(a).

The Government's Point II-A

Under Point II-A Government counsel argues that in any event §8(a) confers upon a pledgee nothing more than a personal privilege to continue to hold the pledged property. Within the limitations of the contract of pledge the pledgee is entitled to possession as against all of the world, and therefore he has what has traditionally been known as a right *in rem*. Where the pledged property consists of shares of stock, and the corporation issuing the shares has notice of the existence of the pledge, the corporation is bound to respect and protect those rights until some supervening lawful power has displaced them.

If the Custodian by issuing a vesting order could not obtain possession of the property by overriding the possessory rights of the pledgee, neither should the Custodian be able to obtain possession indirectly by requiring the issuing corporation to deliver a second set of certificates for the same shares without the express consent of the pledgee. In the case at bar the pledgee has not only withheld such consent, but has warned the issuing corporation that if possession is delivered to the Custodian by the issuance of new certificates, the corporation will act at its peril.

In the instant case the Debtor, as issuing corporation, is not only bound to respect the possessory rights of the pledgee, but it is also bound by its by-laws and by statute to resist the issuance of new certificates to any person who does not surrender the old certificates.

If the Government's contention was correct, the Custodian could readily circumvent the immunity granted by §8(a) through the simple device of making a demand on the issuing corporation and completely disregarding the pledgee.

Even if the right to retain possession of the pledged property is what the Government describes as a "personal privilege", the corporation which issued the certificates must nevertheless respect that "privilege" especially when the pledgee has put the Debtor on notice.

The Government is apparently attempting to spell out of the factual situation some theory of abandonment by the Swiss banks of their possessory rights. However, the Debtor was in the custody of the District Court, and the District Court instead of merely advising the Debtor was acting in its place. The Court had been informed by its trustees that the shares were held by the Swiss banks as

pledgees. This was the factual situation which should have controlled the District Court's decision in deciding whether §8(a) gave exemption from seizure.

While hostilities had ceased in Europe by June 1945, normal channels of communication had not been reestablished, such communication as was possible was conducted under great difficulties and a reasonable time had not elapsed within which the Swiss banks could have been expected to transmit to New York the evidence of their pledges in the form required by American practice.

Under the circumstances, the District Court being the instrumentality through which the Debtor was acting, should have directed the Swiss banks to submit the evidence of their pledges and should have accorded them a reasonable time under the circumstances in which to do so. The failure of the Court to do this is explained by the theory on which it disposed of the case. It held in effect that the Swiss banks had no rights under §8(a). The Court said, "Whatever may be the interests or rights of the Swiss banks, they cannot be considered here" (R. 49). The Court might as well have said that the president of the debtor corporation, having been given notice that some of its shares were held by pledgees was under no duty to ascertain the nature of the pledge when a stranger challenged the rights of the pledgee and was seeking to have the corporation issue new certificates in derogation thereof. The District Court was actually performing the dual function of acting as the instrumentality of the corporation and also of presiding over a judicial tribunal. But its ministerial function was completely ignored.

It follows that whether the rights under §8(a) are personal to the pledgees or otherwise, the District Court should not have avoided the duty of determining what

these rights were, if, as the Debtor claims, §8(a) had not been repealed as to friendly aliens by the amendment to §5(b).

The Government's Point II-B

In arguing that the record is barren of evidence to show that the Swiss banks as pledgees conform with the requirements of §8(a) Government counsel demonstrates a failure to comprehend the function of the District Court as a bankruptcy court in administering the affairs of a corporation in reorganization under the Chandler Act.

It is incorrect for Government counsel to state that there is no evidence of the existence of any pledge. The report of the trustee appointed by the Court shows that a pledge existed as late as December, 1941 (R. 42) and a condition once shown to exist will be deemed to continue until the contrary appears (31 C. J. S., §124, p. 736).

The failure of the District Court to perform the ministerial duties which were incumbent upon it as Custodian of the corporation may well be regarded by a foreign court as a ministerial failure which subjects the Debtor to the same liability as would result if a corporate officer had conducted himself in a similar manner when the corporation was not in the custody of the Court.

The Debtor was in no position to request an opportunity to prove the existence of the pledge as suggested by the Government. It was the Court's duty as Custodian to require the presentation of such proof and this duty the Court failed to perform.

The Government's Point II-C

The assertion of Government counsel that the only interest which the Debtor has in prosecuting this appeal

is the danger of double liability, ignores the fact that the Debtor has been directed to do something (*i.e.,* issue in effect duplicate certificates) which is in violation of its by-laws and of the statutes by which it is controlled. This fact in itself is sufficient to support the Debtor's position. In *Matter of Barnett* (C.C.A. 2nd 1942), 124 F. 2d 1005, a person before becoming bankrupt had assigned an estate in expectancy. Following bankruptcy the trustee obtained an order directing the bankrupt to execute a second instrument of assignment transferring the estate to the trustee. The bankrupt appealed from this order but the assignee failed to do so, and it was urged that the failure precluded the Court from entering an order which would determine the rights of the parties. The Circuit Court of Appeals held that the order of the District Court directing the bankrupt to execute a second instrument was sufficient to justify a reversal. A somewhat similar situation arose in *Fishgold v. Sullivan DryDock Corporation* (1946), 328 U. S. 275, and this Court arrived at a like result.

Aside however from the inherent interest that a corporation has in an order directing it to violate its by-laws and controlling statutes, there is danger of double liability. This danger is present in more than an ordinary way by reason of the fact that the Debtor is a corporation with international holdings and its assets in other countries might very well be made the subject of retaliatory action by foreign courts which challenge the proprietary of action taken by American courts.

After all, it must be remembered that because of the theory on which the District Court proceeded the Swiss banks were not given a fair opportunity to prove their pledges and the decisions set forth at page 66 of the

Silesian main brief indicates that this opportunity should have been afforded them. The banks were in effect, non-suited and a non-suit does not bring into play the rule of *res judicata.*

> *Swift v. McPherson* (1914), 232 U. S. 51;
> *Gardner* v. *Michigan Cent. R.* (1893), 150 U. S. 349;
> *U. S.* v. *Parker* (1887), 120 U. S. 89-95;
> 2 Freeman on Judgments, 5th ed., §755, page 1590.

As to the exculpatory clauses of §5(b)(2) and §7(e), the invalidity of these clauses has been dealt with under Point IV of the Silesian main brief. All of the decisions regarding the unconstitutionality of conclusive presumption have been handed down since World War I. No case has been found in which the validity of the exculpatory clauses has been actually challenged.

The development of such a clause coupled with the immense expansion of the Executive Department in recent years presents a serious question of public policy. Upon being furnished an antidote of this kind, the representative of the Executive Department may readily become immune to the inhibitions which normally are expected to restrain the abuse of administrative power and to prevent capricious conduct. Justification by the righteousness of one's conduct is a democratic safeguard that should not be put aside, however convenient an exculpatory clause under certain conditions may prove to be.

Judge Hand expressed a doubt as to whether an exculpatory clause would be valid with respect to an unconstitutional statute. The Government argues that this is avoided by the Congressional power to restrict the presentation of constitutional issues to an exclusive procedure.

But this argument is beside the point. If the vesting power of §5(b)(1) should be declared unconstitutional, another litigation, perhaps between different parties, would be necessary to determine whether the exculpatory clause in §5(b)(2) nevertheless protected persons who had acted pursuant to the unconstitutional provisions of §5(b)(1).

As pointed out in the Silesian main brief (p. 63) the very large amount of litigation which arose under the Trading With the Enemy Act in connection with World War I clearly demonstrates that the bar did not regard the exculpatory clause in §7(e) as a certain safeguard against possible liability.

The Government's Point III

The heading of Point III in the Government's brief refers to the constitutionality of §5(b) but the argument actually relates to the scope of the vesting power in the amendment to that subdivision.

The Debtor has urged a number of arguments in support of its contention that the vesting power in §5(b) is limited to enemy and ally of enemy property. The Government has attempted to answer some of these arguments in Point III of its *Silesian* brief, some have been referred to as treated in the *Uebersee* brief, and some for one reason or another have been disregarded. The question is basic. The District Court stated, "Whatever may be the interests or rights of the Swiss banks, they cannot be considered here" (R. 49). If, as urged by the Government, the effect of the amendments to §5(b) was to repeal §8(a) so far as it related to friendly aliens, then the decision of the District Court that the rights of the Swiss banks could not be considered by that Court, is correct.

On the other hand, if as claimed by the Debtor, §8(a) and §9(a) as permanent sections of the Act (*Markham* v. *Cabell*, 326 U. S. 404), have not been repealed as to friendly aliens, it follows that the District Court could not properly dispose of the case without considering the interests and rights of the Swiss banks.

As to the question why the Senate Judiciary Committee, having a copy of Judge Hand's opinion in the *Silesian* case before it, did not undertake to have Congress adopt a statutory declaration of the meaning to be placed upon §5(b), there are several considerations which may have moved Congress to adopt such a course. The Committee filed its report on July 26th, 1946, and Congress had planned to adjourn on July 31st. Probably the deadline had passed for the introduction of new bills. In any event, one would normally expect the Senate Judiciary Committee, after having indicated the construction which it believes should be placed upon the statute, to wait until the question had been passed upon by this Court before taking further action. The Congress should not be expected to legislate to cure decisions of the various Circuit Courts before final review by this Court.

As to the enactment of §32, this section was similar to a statute enacted in 1920 following World War I (41 Stat. 977) and was designed to make it possible for the Custodian to return property that had been seized because it was connected with territory at one time occupied by the enemy, and hence owned by persons who would have been enemies under the 1917 Act (H. Rep. 1269, 79th Cong. 1st Sess., p. 2; S. Rep. 920, 79th Cong. 2nd Sess., p. 1 *seq.*). No special significance can be attached to the fact that the President was authorized to return property belonging to corporations controlled by or 50% of the stock of

which was owned by enemies, because substantially the same provision was contained in §9(b)(11) of the old Act as amended in 1923 (42 Stat. 1513). Government counsel evidently derive their argument on this score from their contention that unless §5(b) is construed in the manner they propose, the Custodian would not have the power to vest the property of a Swiss corporation whose shares were owned by Germans. Counsel do not, however, take this argument very seriously, because they claim that aside from the provisions of §5(b) the seizure by the Custodian of the Silesian shares was also a valid seizure under §7(c). Such an argument necessarily implies that the Custodian could seize the property of a Swiss corporation when its shares were owned by Germans (Government's *Silesian* brief, p. 7).

Silesian urges that the enlargement of the freezing controls contained in the amendment of §5(b) coupled with the existing condemnation and requisition statutes rendered unnecessary a further grant of power, which contrary to long standing American traditions, made an insidious distinction between the property of friendly aliens and American citizens (*Silesian* brief, p. 30). The Government attempts to meet this argument by claiming that by a decision of this Court in *Behn, Meyer & Co.* v. *Miller* (1925), 266 U. S. 457, and *Hamburg-American Co.* v. *U. S.* (1928), 277 U. S. 138, this Court held that the property of a corporation which was not organized in enemy territory and which was not actually engaged in business with the enemy could not be seized despite the fact that all the stockholders had been enemies within the definition of the old Act and that the construction of §5(b) proposed by the Government must be adopted so as to enable the Custodian to penetrate certain cloaking

operations which employed corporations organized in foreign non-enemy countries. This argument cannot be sound because if such was the purpose of Congress, why should it have been limited to foreign property? The *Behn* case related to a corporation organized under the laws of a British colony whereas in the *Hamburg-American* case the corporation was organized under the laws of the State of New Jersey. If Congress had desired to circumvent these two cases it was necessary to make the vesting power cover both foreign and domestic property. An examination of the cases themselves, moreover, shows that they do not stand for as broad a rule as claimed by the Government. These cases were decided after Congress in June 1920 generally relaxed the provisions of the Trading With the Enemy Act (41 Stat. 977-979) by adding §9(b) to the statute. Subdivision (6) of the amendment then enacted provided that the President might return property seized by the Custodian if he determined that the owner thereof at the time of seizure was "a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, states or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder."* This provision implicitly means that the Custodian at the time held corporations which he had seized and which had stockholders of enemy nationality. Furthermore, §5(b) as amended contains provisions authorizing the President to modify "definitions not inconsistent with the purposes of this subdivision" (*Silesian*

* In 1923 §9(b)(11) was added to the statute (42 Stat. 1513) whereby it was provided that seized property could be returned if the owner at the time of seizure was a corporation of which the control or more than 50% of the voting power was, at the time of seizure and of return, vested in non-enemy persons

brief, p. 70), and the Custodian was therefore authorized so to define a national of an enemy or ally of enemy foreign country as to include a corporation organized in a neutral country and owned by enemy stockholders. And finally, the definition of enemy corporations in the 1917 statute is either not as rigid as the Government claims, or that definition has been modified through the exercise of the power of definition contained in §5(b), because otherwise it would not be possible for the Government to argue that the vesting order "was an equally appropriate exercise of the power conferred by Section 7(c) of the Act to vest any property belonging to, or held for the benefit of, 'an enemy or ally of enemy'" (Government's *Silesian* brief, p. 7). In the instant case Non-Ferrum, which was the registered owner of the Silesian shares, is a Swiss corporation owned by a German corporation and according to the Government's argument this enemy stock ownership did not make Non-Ferrum an enemy or ally of enemy corporation and precluded the property of the corporation from being seized. Hence, if the Government's argument is correct, the Custodian could not seize the shares described in the vesting order.

Respectfully submitted,

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